Supreme Court, U.S.
FILED
AUG 2 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

No. 78-231

THOMAS C. HARPER
PETITIONER

V

J. ARNOLD FELDMAN
and
DEAN STANTON
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Thomas C. Harper, respectfully pray that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the District of Columbia Circuit entered herein on May 4, 1978.

OPINION BELOW

The decision of the Court of Appeals was rendered without an opinion and is not reported. A copy of that Court's Order of Affirmance is appended hereto at page 1a - 2a. The opinion of the District Court for the District of Columbia is appended at pages 3a - 6a. The Judgment of the District Court is appended at page 6a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1978. The jurisdiction of this Court to review that Judgment rests upon 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether a Federal Employee who intentionally violates Section 2(i)(1) of U.S.C. 552a also known as the Privacy Act of 1974, to encourage a non-federal

employee to institute an EEO proceeding can, assert the claim of absolute immunity as handed down in Barr v. Matteo, 360 U.S. 564 (1959) as a defense to a Civil Suit for damages.

2. Whether a non-federal employee who obtains and uses Statutorily prohibited material, can assert the claim of absolute immunity in accordance with Barr, Supra as a defense to a Civil Suit for damages.

STATUTE CONSTRUED

Section 2(i)(1) of 5 U.S.C. 552(a) states:

> "CRIMINAL PENALTIES...Any officer or employee of an agency who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or

agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000." (underlining supplied)

STATEMENT OF THE CASE

Petitioner seeks review of a judgment of the Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the District Court for the District of Columbia declaring that the disclosure by respondent Feldman, during unauthorized discrimination counseling, of the contents of petitioner's security file to respondent Stanton was privileged under Barr v. Matteo, 360 U.S. 564(1959),(irrespective of the fact that a Federal statue prohibited the disclosure and Mr. Feldman's supervisor, Mr. George H. Robinson, submitted an affidavit attesting to the fact that Mr. Feldman had a duty to counsel people on Drug Abuse and alcoholism but, he had no duty or authority to counsel anyone on

discrimination, said counseling being restricted to trained and certified EEO Counselors thus, Mr. Feldman was acting contrary to SBA Rules and Regulations at the time he made the illegal disclosure about petitioner). The Court also found that the subsequent disclosure by Mr. Stanton, of the illegal information on petitioner he procured from Mr. Feldman, to an EEO Counselor, Marion Byers, to initiate his complaint was privileged under Barr and Shipp v. Waller, 391 F. Supp. 283 (D.D.C. 1975).

It further found that the statements regarding Petitioner of Mr. Feldman and Stanton, that they reduced to writing and gave an EEO investigator, Karen Larson, were also privileged under Barr and Shipp.

Finally, the Court found that Mr. Stanton was an employee of SBA at the time the actions herein complained

about occured, when in fact Mr. Stanton had been terminated three weeks before the actions giving rise to this suit occured.

The facts of this case are as follows:

Petitioner is, and has been employed since September of 1970 with the Small Business Administration (hereinafter referred to as SBA an Agency of the Federal Government). During 1973, petitioner was the subject of a Security Investigation by SBA which resulted in a file being compiled on petitioner. At the time of the aforementioned investigation, Respondent Feldman was petitioner supervisor and had access to and did receive the contents of Petitioner's Security file by virtue of his former position as Petitioner's Supervisor.

On April 27, 1975, Respondent Stanton was hired by SBA and befriended by

Respondent Feldman. On November 28, 1975, Respondent Stanton was terminated by SBA for failure to pay just debts.

Subsequent to the abovementioned termination, Respondent Feldman encouraged Mr. Stanton to file a complaint against SBA and supplied him with material from Petitioner's Security file in violation of The Privacy Act to support the complaint. Respondent Stanton was then directed to an EEO Counselor, Marian Byers, on December 19, 1976, whereupon he initiated an EEO Complaint alleging that petitioner had been treated differently according to information he had from Mr. Feldman.

An EEO Investigator, Karen Larson, was appointed to investigate the complaint and the respondents reduced their disclosures about petitioner to writing. SBA subsequently dismissed the complaint as devoid of merit.

In September of 1976, subsequent to a previous suit that was dismissed, petitioner filed in the Superior Court for the District of Columbia a Civil suit against both respondents alleging Libel, Slander, and violation of his right of privacy under The Privacy Act. Respondent Feldman filed a removal petition pursuant to 28 U.S.C.A. 1442. The District Court denied petitioner's claim holding that respondents were acting within the scope of employment and their communications were absolutely privileged under the holding in Barr. Without addressing respondent Feldman's violation of The Privacy Act, although it found that he did make the disclosure to respondent Stanton, it nevertheless, granted their motion for summary judgment.

An appeal was taken to the Court of Appeals for the District of Columbia

Circuit which summarily affirmed the District Court (1a - 2a).

REASON FOR GRANTING THE WRIT

In overruling petitioner's contention that the Barr holding would not defeat a Civil Action emanating from the willful violation of a Statutory Protected right, the Courts below have decided an important question of law which has not been, but should be, settled by this Court. Moreover, the positions taken by the Courts below is at variance with this Court's interpretation of the limitations of the Barr doctrine. In the most recent decision by this Court involving immunity of Federal Officials, Butz v. Economou, #76-709 p. 10, decided June 29, 1978, it stated that the absolute immunity established in Barr would not have been upheld if the alleged act had been expressly forbidden by statute. The instant case

involves conduct expressly forbidden by statute thus, it is one in which this Court should decide and settle the question of the applicability of the Barr doctrine to an express statutory violation.

This question is obviously one of significant Public importance since it concerns the individual Privacy of millions of Federal Employees falling within the protection of The Privacy Act.

CONCLUSION

For the froegoing reason, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

August, 1978

Thomas C. Harper
Attorney Pro Se

JUDGMENT OF AFFIRMANCE
UNITED STATES COURT OF APPEALS
For The
DISTRICT OF COLUMBIA CIRCUIT

DOCKET NOS. 76-2189, 77-1402

THOMAS C. HARPER

PETITIONER

v.

J. ARNOLD FELDMAN
and
DEAN STANTON

RESPONDENTS

Before:

TAMM and ROBINSON, Circuit Judges,

and OBERDORFER, District Judge*

Appeal from the United States District Court for the District of Columbia.

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*Sitting by designation pursuant to 28, U.S.C. Section 292(a).

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by Counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(a).

On consideration of the foregoing, it is ordered an adjudged by this Court that the Judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

George A. Fisher
Clerk

OPINION AND JUDGMENT

of the

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS C. HARPER	:	
	:	
PLAINTIFF	:	
	:	
v.	:	Civil Action #76-2189
	:	
J. ARNOLD FELDMAN et al.,	:	
	:	
DEFENDANTS	:	

MEMORANDUM ORDER

This matter came before the Court on defendant Feldman's motion to dismiss or in the alternative for Summary Judgment, defendant Stanton's motion for Summary Judgment, and plaintiff's consolidated oppositions thereto.

As a general rule, government officials enjoy a blanket of immunity from civil liability from torts committed while acting within the scope of their official duties. Barr v. Matteo, 360 U.S. 564 (1959). The guide delineating

the scope of the official's immunity at civil defamation suits, such as the case at bar, is the relation of the publication complained of the duties entrusted to the officer. Id. at 573-74. The fact that the action taken by the official was within the "outer perimeter" of his duties is sufficient to render the privilege applicable. Id. at 575.

It appears that the allegedly defamatory communications made by defendant Feldman to defendant Stanton and to EEO investigator Larson were well within the "outer perimeter" of his duties as, inter alia, Deputy Director for Compliance, Office of Equal Opportunity and Compliance, Small Business Administration. Defendant Feldman was, therefore cloaked with the privilege of absolute

immunity.[1] Since there are no genuine issues as to any material fact with regard to defendant Feldman, we hold that he is entitled to judgment as a matter of law.

Furthermore, we concur with Judge Gasch of this Court who recently ruled that under Barr, government employees enjoyed absolute immunity with respect to oral and written statements they had made to an Equal Employment Opportunity Investigator in the course of an EEO action. Shipp v. Waller, 391 F. Supp.

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[1] This Court is not unaware that in certain civil rights contexts (actions brought under 42 U.S.C. Section 1983 involving constitutional rights allegedly violated by state officials), the Supreme Court has applied the common law rules of qualified immunity. See, Pierson v. Ray, 386 U.S. 547 (1967); Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975). We do not believe, however, that these Section 1983 cases overrule or modify the Barr doctrine of absolute immunity as it applies to civil defamation actions.

283 (D.D.C. 1975).

In our judgment, the position of defendant Stanton in this litigation is essentially the same as the defendants in Shipp.

The allegedly defamatory statements regarding plaintiff's credit record were made by defendant Stanton, an SBA employee, to Ms. Marian Byers, an EEO Counselor, whose official responsibilities include consultation with employees desiring to file EEO complaints, and to Ms. Karen Larson, an investigator from the U.S. Civil Service Commission appointed to conduct an investigation into defendant Stanton's EEO complaint.

The communications by defendant Stanton in both instances are, under Shipp and Barr, absolutely privileged.

In light of the above, and since there are also no genuine issues of

material fact, defendant Stanton is entitled to summary judgment.

Accordingly, it is by the Court this 21st day of March, 1977.

ORDERED, that the motions of defendants for Summary Judgment be, and the same are, hereby granted.

John H. Pratt
UNITED STATES DISTRICT JUDGE

Supreme Court, U. S.
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OCTOBER TERM, 1978

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J. ARNOLD FELDMAN AND DEAN STANTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

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J. ARNOLD FELDMAN AND DEAN STANTON

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner brought this action against two fellow employees of the Small Business Administration who, he alleges, unlawfully made public information compiled on him in the course of an internal SBA investigation. He contends that he is entitled to damages for the alleged defamation.

The circumstances at issue here grew out of a racial discrimination proceeding initiated by respondent Stanton. Stanton, an employee of the Office of

Minority Small Business at the SBA, was notified in 1975 that he would be fired because he had written two bad checks while traveling on agency business.[1] He consulted with other employees of the agency, including respondent Feldman, on whether and how to resist his discharge (Stanton Affidavit). Feldman was at the time the chief of the compliance division of the Office of Equal Employment and Compliance, Deputy Civil Rights Coordinator for the agency, a counsellor for troubled employees, and a former president of the employees' union (Respondent Feldman's Motion to Dismiss Or in the Alternative for Summary Judgment, Attachment B ["Feldman Affidavit"]).

Feldman told Stanton that other employees of the agency had had far more serious financial problems that had not resulted in discharge. The two apparently discussed the case of petitioner, who had been investigated by the SBA two years before, after he allegedly had accumulated a large debt to a restaurant that was seeking an SBA loan. Petitioner was at the time allegedly urging that the agency make the loan. Feldman was petitioner's supervisor and was therefore familiar with the results of the investigation. He recommended that petitioner be fired, but one Higgins, at the time Feldman's superior, merely gave petitioner a reprimand. Higgins was

[1] The checks had been dishonored because SBA employees had not deposited one of Stanton's paychecks into his checking account, as he had expected. When Stanton learned of the error, he promptly made restitution (Respondent Stanton's Motion for Summary Judgment, Exhibit B ["Stanton Affidavit"]).

the same official who later fired Stanton (Feldman Affidavit).

As a result of this and other discussions, Stanton filed a discrimination complaint with the agency, alleging that he had been fired because of his race.[2] In the course of the ensuing SBA investigation, Stanton and Feldman both provided affidavits in support of the charge of discrimination that recounted, among other things, petitioner's story.[3] Petitioner learned of the statements and in May and June of 1976 wrote letters to the SBA Director of Personnel demanding that the accounts of his case be removed from the Stanton investigatory file and that Feldman be disciplined. Petitioner filed a complaint in the Superior Court of the District of Columbia, for "slander, libel, invasion of privacy, and damages" against Feldman and Stanton.[4] The case was removed to the federal

[2] Stanton and Feldman are white; Higgins and petitioner are black.

[3] The SBA ultimately concluded that Stanton's discharge was not racially motivated. Stanton filed suit against the agency under 42 U.S.C. (Supp. V) 2000e-16. By stipulation and consent decree, he was reinstated to his former job, retroactive to the date of his discharge. *Stanton* v. *Kobelinski*, No. 76-2306 (D. D.C. Feb. 16, 1977).

[4] On July 20, 1976, petitioner had filed a similar suit in the district court. The district court dismissed that case *sua sponte* on October 20, 1976, after petitioner failed to comply with an order to amend his complaint to set out a basis of federal jurisdiction.

On August 5, 1976, petitioner filed an additional suit against Mitchell Kobelinski, Administrator of the SBA, and others, alleging violations of the Privacy Act, 5 U.S.C. 552a, and

district court under 28 U.S.C. 1442(a)(1), and the district court, holding that the suit is barred by absolute immunity under *Barr* v. *Matteo*, 360 U.S. 564 (1959), entered summary judgment for the respondents (Pet. App. 3a). The court of appeals affirmed without opinion (Pet. App. 1a).

2. This case is controlled by *Barr* v. *Matteo*, *supra*, and *Expeditions Unlimited Aquatic Enterprises* v. *Smithsonian Institution*, 566 F.2d 289 (D.C. Cir. 1977) (en banc), cert. denied, No. 76-418 (July 3, 1978). *Barr* and *Expeditions* hold that government officials have absolute immunity from damages for defamation allegedly occurring in the course of official duties. This aspect of *Barr* remains the law after *Butz* v. *Economou*, No. 76-709 (June 29, 1978). This Court made it clear in *Butz* that its decision was limited to suits alleging deprivations of constitutional rights (slip op. 27), and that absolute immunity in defamation actions still is appropriate.

Petitioner asserts that the courts below decided that absolute immunity exists even where the official in question has violated a statutory standard, and that such a ruling is contrary to *Butz* v. *Economou*. But petitioner's complaint asserts no cause of action

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seeking an injunction against any use of the disputed material allegedly taken from his investigatory files. Summary judgment for the Administrator was granted September 30, 1976, when petitioner failed to answer a motion arguing, among other things, that he had failed to exhaust his administrative remedies under the Privacy Act. This case was consolidated on appeal with the instant case but has not yet been decided by the court of appeals.

against Stanton and Feldman under a federal statute.[5] It alleges, instead, that they committed "slander, libel, invasion of privacy and damages" (Complaint at 1). The complaint consequently states a claim under the common law, but no more.

There is, moreover, no reason to allow an action against federal employees in a case such as this. The Privacy Act, 5 U.S.C. 552a(g), creates a right to an injunction to remove defamatory materials from personnel files. Petitioner's suit under this provision is pending (see note 4, *supra*). If the agency acted willfully or intentionally—as petitioner alleges it did—he could also recover damages of at least $1000 plus costs under Section 552a(g)(4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978

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[5] See note 4, *supra*. And any such allegation would fail to state a claim on which relief could be granted. See *Cell Associates* v. *National Institutes of Health*, 579 F.2d 1155 (9th Cir. 1978).

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